

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CAPELLO *et al.*,

Plaintiffs,

v.

SELING, *et al.*,

Defendants.

Case No. C02-5242RBL

REPORT AND  
RECOMMENDATION  
REGARDING  
LOU BROCK

**NOTED FOR:  
JULY 14<sup>th</sup>, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is a summary judgment motion filed by defendants. This Report and Recommendation deals only with the claims of Lou Brock.

PROCEDURAL HISTORY

Defendants filed a large number of summary judgment motions during July of 2004. The dispositive motion cut off date was July 30<sup>th</sup>, 2004. (Dkt. # 195). The motions were supported by a general brief and declarations. (Dkt. # 229 and 230 through 242). On July 28<sup>th</sup>, 2004, defendants filed a memorandum specific to Mr. Brock. (Dkt. # 336). The memorandum

1 and attached declarations addressed the mental health treatment available and issues specific to  
2 Mr. Brock. (Dkt. # 336 and 337).

3 Plaintiffs filed a single response to all the summary judgment motions. (Dkt. # 404).  
4 While the court had authorized each plaintiff to file an over length brief, the court did not  
5 authorize the filing of this document which contained over one thousand pages of briefing and  
6 materials.

7 Plaintiff supports his response with a number of declarations. (Dkt. # 405 through 421).  
8 Plaintiff also submits his own declaration. (Dkt. # 417). Defendants reply and note that none of  
9 the information provided by plaintiff creates a genuine issue of material fact that implicates any  
10 named defendant in this action. (Dkt. # 391).

### 11 FACTS AND CLAIMS

12 This action is one in a series of legal actions regarding the Special Commitment Center  
13 (SCC). Plaintiffs challenge the mental health treatment provided and conditions of confinement.  
14 The plaintiffs are all persons confined for mental health treatment. The SCC is designed to treat  
15 persons whose mental abnormalities or personality disorders make them likely to engage in  
16 predatory acts of sexual violence. (Dkt. # 229, page 3).

17 For over a decade the SCC operated under federal oversight as a result of injunctions  
18 issued by the United States District Court in Seattle. In 1991 the court found conditions of  
19 confinement unconstitutional and found the mental health treatment offered inadequate. Turay  
20 v. Seling, C91-0664RSM. On June 19<sup>th</sup>, 2004 the court found the defendants in substantial  
21 compliance and lifted the injunctions with one exception. Turay v. Seling, C91-0664RSM (Dkt  
22 # 1906).

23 This plaintiff, Mr. Brock, was first sent to the SCC as a pre trial detainee in March of  
24 1991. He was committed in November of 1991. (Dkt. # 336, page 2).

25 Mr. Brock's Civil Commitment Evaluation diagnosis includes "Paraphilia Not Otherwise  
26 Specified-Rape, Rule out Sexual Sadism, Alcohol Dependence, in remission since  
27

1 incarceration<sup>1</sup>, and Antisocial Personality Disorder. (Dkt. # 337, Declaration of Daniel  
2 Yanisch, Attachment B, page 4).

3 Mr. Yanisch, in his declaration, states that in his professional opinion the treatment  
4 available to plaintiff provides plaintiff with an opportunity to improve the conditions for which  
5 he is committed. (Dkt. # 337). The Plaintiff has not contradicted the factual representations or  
6 assertions made by defendants.

7 Mr. Brock has participated in treatment sporadically over the last 15 years. He has  
8 never progressed beyond phase II and left treatment for a number of years because he was not  
9 promoted to Phase III. (Dkt. # 336, Exhibit 1, Deposition of Lou Brock).

10 Defendants' motion for summary judgement is very specific. Defendants seek summary  
11 judgment because the complaint does not "accurately represent each plaintiff's claims, and  
12 because **each plaintiff must demonstrate the merit of his own claims to go forward.**" (Dkt.  
13 # 229)(emphasis added). Defendants ask for summary judgment based on the Eleventh  
14 Amendment, qualified immunity, personal participation, and lack of a constitutional violation.  
15 (Dkt. # 229, pages 18 through 37). In essence, defendants argue that none of the plaintiffs can  
16 show an injury of constitutional magnitude specific to that plaintiff.

17 In his declaration, plaintiff expresses his opinions regarding treatment at the SCC.  
18 Plaintiff provides no evidence to show the treatment offered him is inadequate. (Dkt. # 417).  
19 Plaintiff indicates that he has been denied treatment for three years from 2000 to 2003 but the  
20 record clearly shows treatment is available, but treating staff at the SCC refuse to promote  
21 plaintiff to level III and plaintiff refuses treatment without being promoted to level III. (Dkt. #  
22 391, Exhibit 4, Excerpt from the deposition of Lou Brock, deposition pages 58 to 61). Thus, it  
23 is plaintiff's refusal to engage in treatment without having his demands met that has prevented  
24 treatment, not a refusal to treat. One of the issues preventing promotion is plaintiff's refusal to

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25  
26 <sup>1</sup> While the diagnosis indicates the Alcohol Dependency is in remission due to  
27 incarceration Mr. Brock testified to making "pruno" for self use as often as one batch every 72  
hours while incarcerated. (Dkt. # 336, Exhibit 1).

1 acknowledge his crimes as sexual in nature. (Dkt #. 417, page 2).

2 In his declaration plaintiff argues some classes are not being taught in a professional  
3 manner and some instructors are arbitrary in grading or advancing residents. Plaintiff alleges  
4 that information written about him by staff may be inaccurate or false. Plaintiff does not  
5 implicate any named defendant in his allegations. (Dkt. # 417).

6 Defendants reply and note that Mr. Brock's opinion regarding the adequacy of  
7 treatment, unsupported by expert testimony, does not create a genuine issue of material fact.  
8 (Dkt. # 391). Defendants systematically address each issue raised by Mr. Brock in either his  
9 declaration or his deposition and show there is no genuine issue of fact precluding summary  
10 judgment. (Dkt. # 391)

11 Defendants note:

12 Mr. Brock states that several false statements have been made regarding  
13 him that have damaged him in some way. These allegations include false  
14 information in his annual review reports, allegations by Mark Davis (an SCC  
15 employee) that he reported drug smuggling into the institution, and an accusation  
16 that he was becoming too interested in his Native American counselor. Brock  
17 Decl. at 4-6. Notably, none of the people he accuses of making false statements,  
18 Regina Harrington, Mark Davis, and Jack Sowers, are defendants in this matter.  
19 *Id.* A § 1983 claim cannot be based on a theory of supervisory liability. *Monell v.*  
20 *New York City Dep't of Social Servs.*, 436 U.S. 658, 690-94 (1978). Thus, these  
21 claims should be dismissed.

22 (Dkt. # 391, page 5). Further, Defendants note:

23 Mr. Brock provides no facts to show that Drs. Seling or Smith, or  
24 Defendants Quasim and Braddock personally participated in any alleged  
25 constitutional violation. The only allegation of constitutional violation is against  
26 Vince Gollogly for failing to promote him to Phase III. Brock Decl. at 2-3. The  
27 evidence shows that the denial of advancement was proper as Mr. Brock has  
28 failed to satisfy the necessary requirements. *See supra* I.A. Accordingly, the  
Court should dismiss all claims as to the defendants in their personal capacities.  
*See Leer*, 844 F.2d at 632-33.

(Dkt. # 391, page 6).

Mr. Brock provides no facts to show that defendants personally participated in a  
constitutional violation. Plaintiff places great weight on the findings of fact made in Turay v.  
Seling, and other cases without a showing that the findings apply to him. Thus, Mr. Brock

continues to argue this action in the abstract. By way of example, he argues damages are “best weighed by everyday spent without constitutionally adequate mental health treatment and more considerate conditions of confinement than prisoners.” (Dkt. # 404 page 6). Plaintiff has no evidence to support his assertions that the treatment offered him is in any way inadequate. Plaintiff’s response does not meet the requirement of a specific evidentiary showing. Further, plaintiff fails to show that any named defendant played any part in the alleged constitutional violations.

### THE STANDARD

Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial, e.g. the preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W.

1 Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute or controversy  
 2 in favor of the nonmoving party only when the facts specifically attested by the party contradicts  
 3 facts specifically attested by the moving party. *Id.*

4 The nonmoving party may not merely state that it will discredit the moving party's  
 5 evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W.  
 6 Elec. Service Inc., 809 F.2d at 630.(relying on Anderson, supra). Conclusory, nonspecific  
 7 statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v.  
 8 National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

9 In addition, the court is mindful that an action for injunctive relief focuses on whether  
 10 the combined acts or omissions of state officials violate a constitutional right or duty owed the  
 11 plaintiff. In contrast, when a plaintiff seeks to hold a defendant personally liable the inquiry into  
 12 causation is more specific and focuses on that persons specific actions. Leer v. Murphy, 844 F.  
 13 2d. 628, 632 (9th Cir. 1988).

#### 14 DISCUSSION

15 The plaintiffs' reliance on Turay is misplaced. The holdings do not equate to findings of  
 16 liability for damages against any named defendant because of the difference in standards of  
 17 proof between actions for injunctive relief and actions for damages. This difference was briefed  
 18 by defendants who stated:

19 As Judge Leighton explained in a similar case: "Turay has no talismanic  
 20 quality, the mere invocation of which conjures a cause of action." Hoisington, et  
 21 al. v. Seling, et al., No. C01-5228-RBL, October 28, 2003, Order at 6 (dkt. #  
 22 189). Turay is of assistance to plaintiffs in this case only if (1) they are able to  
 23 identify a specific ruling from Turay that, for qualified immunity purposes, was  
 24 sufficient to put defendants on notice that their conduct potentially violated  
 25 plaintiffs' constitutional rights; or (2) they can point to a specific factual finding  
 26 from Turay that could apply by way of collateral estoppel. In either case, each  
 27 plaintiff must first show how a specific ruling or finding from Turay applies to his  
 28 situation and establishes a violation of his constitutional rights. In doing so, each  
 plaintiff must be aware that relief ordered in Turay does not represent the  
 constitutional minimum. See Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir.  
 2000) ("A court may order 'relief that the Constitution would not of its own  
 force initially require if such relief is necessary to remedy a constitutional  
 violation.'"). In Sharp, the Ninth Circuit specifically noted that Judge Dwyer's  
 findings in Turay did not imply the existence of constitutional rights. Thus, for

1 example, Judge Dwyer's order that SCC provide residents private visitation  
2 rooms and educational opportunities did not mean that the residents had a  
constitutional entitlement to those things. Id.

3 (Dkt. # 229, pages 21 and 22).

4 The defendants filed a separate motion for summary judgment for each plaintiff that sets  
5 forth the treatment provided or available to that person and that persons factual history. The  
6 summary judgement standard requires a plaintiff to "present specific, significant probative  
7 evidence." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

8 Mr. Brock was informed of the summary judgment standard. (Dkt. # 195). The court  
9 specifically informed plaintiff that if the opposing party moved for summary judgment he would  
10 need to:

11 **[s]et out specific facts in declarations, deposition, answers to**  
12 **interrogatories, or authenticated documents, as provided in Rule 56(e), that**  
13 **contradict the facts shown in the defendant's declarations and documents**  
14 **and show that there is a genuine issue of material fact for trial. If you do**  
15 **not submit your own evidence in opposition, summary judgment , if**  
16 **appropriate, may be entered against you. If summary judgment is granted,**  
17 **your case will be dismissed and there will be no trial. Rand v. Rowland, 154**  
18 **F.3d 952, 962-963 (9th Cir. 1998)(emphasis added).**

19 (Dkt. # 195). (emphasis in original order). Mr. Brock has failed to come forward with any  
20 evidence to show that any right or duty owed to him has been violated by any named defendant.  
21 His allegations in the complaint are unsupported by any evidence that shows he has suffered any  
22 constitutional injury.

23 Plaintiff complains about a number of issues without providing any evidence to show  
24 any named defendant played any part in the alleged conduct. (Dkt. # 421 and 415). He  
25 complains about medical care and treatment promotions, but defendants show plaintiff receives  
26 treatment when he asks for it and there are no conditions on his treatment. By way of example,  
27 plaintiff was originally not treated for his Hepatitis C because of his refusal to stop drinking.  
(Dkt. # 336, page 5). With regard to mental health treatment, plaintiff's refuses treatment  
without a promotion to Phase III, but plaintiff has not meet care providers requirements for  
advancement. Further, plaintiff has not shown any constitutional violation regarding the

1 conduct of any named defendant. While he complains of his treatment he has not shown either  
2 personal participation or injury. He does not substantiate any allegation that a named defendant  
3 in this action ever denied or delayed medical or dental treatment. The same analysis is true for  
4 the remaining claims. There is simply no evidence that implicates any named defendant.  
5 Defendants are entitled to summary judgment based on this plaintiffs lack of evidence that he  
6 was subjected to any unconstitutional condition attributable to the actions of any named  
7 defendant. The defendants are entitled to summary judgement as a matter of law.

8 CONCLUSION

9 Defendants are entitled to summary judgment as plaintiff has failed to show a  
10 any injury. Defendants motion for summary judgment should be **GRANTED**. A proposed order  
11 and proposed judgment accompanies this Report and Recommendation.

12 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
13 Procedure, the parties shall have ten (10) days from service of this Report to file written  
14 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
15 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
16 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
17 **July 14<sup>th</sup>, 2006**, as noted in the caption.

18 DATED this 12<sup>th</sup> day of June, 2006.  
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24 Karen L. Strombom  
25 United States Magistrate Judge  
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